

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SECOND MEASURE, INC.,
Plaintiff,
v.
STEVEN KIM,
Defendant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cv-03395-JCS

**ORDER DENYING COUNTERCLAIM
DEFENDANT SECOND MEASURE,
INC.'S MOTION TO DISMISS
PURSUANT TO FRCP 12(b)(6), AND, IN
THE ALTERNATIVE, MOTION FOR
MORE DEFINITE STATEMENT
PURSUANT TO FRCP 12(e)**

Re: Dkt. No. 11, 19

I. INTRODUCTION

Plaintiff Second Measure, Inc. ("Second Measure") brought this action against Defendant Steven Kim in San Mateo County Superior Court, seeking a declaration that Kim does not have an equity interest in Second Measure, along with other relief. Compl. (dkt. 1, Ex. A) at 5–6. On July 23, 2015, Kim removed the case to this Court on the basis of diversity jurisdiction under 28 U.S.C. § 1332. Def's Notice of Removal (dkt. 1) at 2. On August 3, 2015, Kim filed an Answer and Counterclaims, asserting counterclaims against Second Measure and its official corporate founders, Michael Babineau and Lillian Chou (collectively, the "Counterclaim Defendants"). Dkt. 7 at 16–21, ¶¶ 25–69. The counterclaims are based on allegations that Second Measure was created as a result of a partnership or joint venture between Kim and Babineau and that Babineau wrongfully shut Kim out of the partnership or joint venture. *Id.* at 11–15, ¶¶ 10–24.

On August 28, 2015, Second Measure filed a Motion to Dismiss Pursuant to Rule 12(b)(6) and Alternative Motion for a More Definite Statement (the "Motion," dkt. 11), and Babineau and Chou filed a Notice of Joinder in the Motion. Dkt. 19. The Court held a hearing on the Motion on

1 Friday, November 6, 2015, at 9:30 a.m. For the reasons stated below, the Motion is DENIED.¹

2 **II. BACKGROUND**

3 **A. Factual Background**

4 The parties present conflicting factual histories about Kim's role in the founding of Second
5 Measure, but the parties appear to agree on the following general timeline. In September of 2013,
6 Kim and Babineau discussed a business plan related to analyzing datasets on credit card spending
7 to generate profits for investors. Answer to Complaint and Counterclaims ("Answer and
8 Counterclaims," dkt. 7) at 11, ¶ 12; Compl. ¶¶ 7–8. By late September of 2014, any role that Kim
9 had in founding a company with Babineau based on this plan had ended. Answer & Countercl. at
10 15, ¶ 23; Compl. ¶¶ 13–16. At some point after September of 2014, Babineau and Chou
11 incorporated Second Measure to "build tools and services designed to leverage consumer spending
12 data for the ultimate benefit of hedge funds and other investors." Compl. ¶ 4; Answer &
13 Countercl. at 15, ¶ 24. Beyond this general timeline, the parties offer conflicting characterizations
14 of Kim's relationship with Babineau and Second Measure.

15 According to Kim, around September of 2013, he and Babineau entered into an oral
16 agreement to develop a business as a joint venture or partnership based on the plan they had
17 discussed. Answer & Countercl. at 12–13, ¶ 14. Under this agreement, Kim and Babineau were
18 to have equal ownership, equal profit interests, and equal control in the management of the
19 business. *Id.* Kim—who has worked as an investor—was to lead the business side of the
20 enterprise, and Babineau—who is a computer engineer—was to lead the technical side. *Id.* at 11–
21 13 ¶¶ 11, 13, 14. They initially planned to call their business "Recon" but later agreed change the
22 business's name to "Second Measure." *Id.* at 12–13, ¶ 14.

23 The Answer and Counterclaims describes how Kim and Babineau worked to develop the
24 business together over the next year. *Id.* at 13–15, ¶¶ 15–20. They worked long hours together,
25 organizing the datasets on which their business was based. *Id.* at 13–14, ¶¶ 16–17. They split
26 costs for business expenses, and Babineau sought Kim's approval for computer server-related

27
28 ¹ The parties have consented to the jurisdiction of the undersigned magistrate judge for all
purposes pursuant to 28 U.S.C. § 636(c).

1 expenses. *Id.* at 14, ¶ 18. And they signed tandem non-disclosure agreements with a data provider
2 to acquire consumer spending datasets. *Id.* at 13, ¶ 15.

3 According to Kim's allegations, Babineau and Kim were still working together to develop
4 the business in September of 2014. *Id.* at 14–15, ¶ 20. As specific examples of their continued
5 coordination in the fall of 2014, Kim quotes two emails he received from Babineau. In an email
6 dated September 11, 2014, Babineau allegedly wrote to Kim, "Right now it doesn't feel we are
7 maximizing our chances for success. How can we be better as a team?" *Id.* In an email sent the
8 following day, Babineau allegedly wrote, "I want us to be back on the same page! Let's get this
9 shit figured out and get rich together." *Id.*

10 At some point in 2014, Chou, who was Babineau's girlfriend, became involved with the
11 business. *Id.* at 14, ¶ 19. While she was initially included to help Babineau with the technical side
12 of the business, Kim alleges that she and Babineau "formed an undisclosed intent to eventually
13 wrongfully exclude [Kim] from the joint venture/partnership." *Id.* at 14–15, ¶¶ 21, 19. In late
14 September of 2014, Babineau and Chou shut Kim out of the business by blocking his access to
15 their servers, applications, and Kim's prior work product. *Id.* at 15, ¶ 23. Kim alleges that the
16 Counterclaim Defendants later offered to hire him as a consultant with a small equity share in the
17 business to settle the dispute, but Kim rejected the offer. *Id.* Finally, Kim alleges that Babineau
18 and Chou incorporated Second Measure as their own business and that the company has received
19 seed investments in exchange for equity shares. *Id.* at 15, ¶ 24.

20 Second Measure offers a different story.² According to Second Measure, Kim and
21 Babineau began discussing the possibility of a business venture after Kim introduced Babineau to
22 Zafar Jafri, a financial research analyst, in July of 2013. Compl. ¶¶ 7–8. Jafri had access to large
23 consumer spending datasets and wanted to trade based on trends in those datasets. *Id.* ¶ 7. After
24 the introduction, Babineau and Jafri discussed potential solutions to some technical issues
25 involving the datasets. *Id.*

26
27 ² For the purposes of Second Measure's Motion to Dismiss, the Court accepts Kim's factual
28 allegations as true. The Court presents Second Measure's allegations to provide a more complete
representation of the record and because the factual allegations provide background for Second
Measure's legal position in this Motion.

1 In September of 2013, Babineau and Kim discussed the possibility of forming a business
2 using Jafri's ideas, but Second Measure claims that there was no agreement to form a business, to
3 split equity in a business, or to assign intellectual property to a business. *Id.* ¶¶ 8, 10, 11. Instead,
4 the Complaint alleges that Babineau and Kim were merely "evaluat[ing] the possibility of forming
5 a business." *See id.* ¶¶ 10, 12, 13.

6 Second Measure alleges that Chou became involved with the business in October of 2013.
7 Second Measure further alleges that by March of 2014, Kim had "terminated his involvement with
8 the business evaluation" because the three were unable to secure a continued agreement with their
9 data provider and because Kim moved from California to Texas. *Id.* ¶ 12. From that point on,
10 Kim "showed no interest in continuing to evaluate the business . . . [or] work[ing] with Babineau
11 and Chou to form a definite business built on the concept they were evaluating." *Id.* ¶ 13.

12 Second Measure claims that the only agreement to form a business occurred between
13 Babineau and Chou in August of 2014 and that Kim declined to participate. *Id.* After making this
14 decision, Babineau and Chou "start[ed] anew" by discarding all code developed prior to
15 September of 2014, and they began work on their new business, "wiped clean of any input from
16 Kim." *Id.* ¶¶ 14–15. It was this new business that Babineau and Chou incorporated as "Second
17 Measure, Inc." in January of 2015. *Id.* ¶¶ 15, 4.

18 Around January of 2015, Second Measure claims it offered Kim a consulting position in
19 exchange for an 8% equity interest in Second Measure to vest over four years. *Id.* ¶ 16. In the
20 role, Kim was supposed to advise the company based on his financial expertise and introduce the
21 company to potential clients and investors. *Id.* Second Measure claims that Babineau and Kim
22 entered into an oral agreement on these terms. *Id.* However, Second Measure alleges that Kim
23 never performed the consulting services on which he and Babineau had agreed. *Id.* ¶ 17.

24 **B. Procedural History**

25 On March 11, 2015, attorney Don Buder sent a letter to Babineau stating that Buder had
26 been retained by Kim to represent Kim in connection with his equity interest in Second Measure.
27 Compl., Ex. 1. The letter states that Kim has a "substantial equity interest" in the company. *Id.*
28 The letter further advises Babineau that he has a fiduciary duty to Kim and should be aware of

1 Kim's equity interest when making representations about Second Measure's capital stock. *Id.* In
2 response to the letter, Second Measure filed a complaint in the San Mateo County Superior Court
3 on June 4, 2015, seeking judicial declarations that Kim has no equity interest in Second Measure
4 and that Second Measure's directors and officers have no fiduciary duty to Kim. Compl. at 6.
5 The Complaint also seeks monetary damages for Kim's breach of the oral consulting agreement he
6 allegedly entered into with Babineau. *Id.*

7 Kim removed the case to this Court on the basis of diversity jurisdiction under 28 U.S.C. §
8 1332 on July 23, 2015. Notice of Removal at 1. The Notice of Removal states that complete
9 diversity exists because Kim is a citizen of Texas and Second Measure is a Delaware corporation
10 with its principal place of business in California. *Id.* ¶¶ 7–8. Kim argues that the amount-in-
11 controversy requirement is satisfied because his 50% equity interest in Second Measure is worth
12 more than \$75,000. *Id.* ¶ 10. Kim has included a declaration in support of removal in which he
13 states “on information and belief that the current valuation of Second Measure exceeds \$160,000.”
14 *Id.*, Kim Decl. ¶ 2.

15 On August 3, 2015, Kim filed an Answer to Complaint and Counterclaims. Dkt. 7. The
16 Answer and Counterclaims denies Second Measure's characterization of the facts and right to
17 relief and asserts a number of affirmative defenses. *Id.* at 2–8. The pleading asserts a
18 counterclaim of conversion against Second Measure, Babineau, and Chou, alleging that the
19 Counterclaim Defendants have wrongfully taken company property, assets, and profits to which
20 Kim was entitled (Counterclaim 7). *Id.* at 21, ¶¶ 63–69. The pleading also asserts five
21 counterclaims against Babineau based on Babineau's alleged breach of an agreement to conduct
22 business with Kim: breach of express joint venture agreement (Counterclaim 1), breach of implied
23 joint venture agreement (Counterclaim 2), breach of express partnership agreement (Counterclaim
24 3), breach of implied partnership agreement (Counterclaim 4), and breach of fiduciary duty
25 (Counterclaim 5).³ *Id.* at 16–20, ¶¶ 25–62.

26 Second Measure filed the instant Motion on August 28, 2015, seeking dismissal of all six
27

28 ³ The Answer and Counterclaims does not include a “Counterclaim 6.”

1 of Kim's counterclaims under Rule 12(b)(6) for failure to state a claim on which relief may be
2 granted. Mot. at 6.

3 **C. Parties' Arguments**

4 **1. Second Measure's Motion**

5 In its Motion, Second Measure seeks dismissal of all of Kim's counterclaims based on four
6 main arguments. Mot. at 10–15. First, Second Measure contends that each counterclaim depends
7 upon the existence of a joint venture or partnership, yet the Answer and Counterclaims fails to
8 adequately plead the existence of either. *Id.* at 10–11. According to Second Measure, the
9 pleading is deficient because it fails to allege specific facts as to the usual indicia of a partnership
10 or joint venture under California law: co-ownership of property, sharing of gross returns, and
11 sharing of business profits. *Id.* at 10 (citing Cal. Corp. Code § 16202(c)). Second Measure further
12 argues that the sharing of business profits is the only indicium of the existence of a partnership
13 that leads to a presumption of the partnership's existence, so the pleading's omission of any
14 allegations regarding the sharing of business profits indicates that no partnership or joint venture
15 existed. *Id.* at 10 (citing Cal. Corp. Code § 16202(c)(3)).

16 Under its first argument, Second Measure contends that Counterclaims 1–4—for breach of
17 an express or implied joint venture or partnership agreement—must be dismissed because Kim
18 fails to adequately plead the existence of any such agreement. *Id.* at 11. Second Measure
19 contends that Counterclaim 5, for breach of fiduciary duty, also must be dismissed because
20 Babineau did not owe Kim a fiduciary duty in the absence of a joint venture or partnership
21 agreement. *Id.* Finally, Second Measure argues that Counterclaim 7, for conversion, must be
22 dismissed because Kim fails to allege the existence of a partnership or joint venture, so there was
23 no partnership or joint venture property for the Counterclaim Defendants to convert. *Id.*

24 Second Measure next argues that before asserting counterclaims against Babineau arising
25 out of any joint venture or partnership—assuming one existed—California law requires Kim to
26 seek a dissolution of the joint venture or partnership and an accounting. *Id.* at 11–12 (citing *Stodd*
27 *v. Goldberger*, 73 Cal. App. 3d 827, 837 (1977), and *Corrales v. Corrales*, 198 Cal. App. 4th 221,
28 228 (2011)). Only after such a procedure, Second Measure contends, is it possible to determine

1 the true standing of the parties and whether or not the defendant partner is indebted to the plaintiff
2 partner. *Id.* at 12. Because Kim did not seek dissolution and an accounting, Second Measure
3 contends that the counterclaims against Babineau should be dismissed. *Id.* Second Measure
4 further argues that if Kim seeks dissolution and an accounting, the procedure may reveal that any
5 property belonging to the partnership or joint venture must be distributed to creditors, thus
6 showing that there was no property for the Counterclaim Defendants to convert. *Id.*

7 Third, Second Measure argues that any partnership or joint venture created by Babineau
8 and Kim dissolved in September of 2014, after which point Babineau was free to continue in the
9 same line of business. *Id.* at 12–13. That is, because Kim does not allege that he and Babineau
10 formed a partnership for a definite term, either one was free to withdraw and dissolve the
11 relationship at any time. *Id.* at 13. Second Measure argues that Kim’s allegations describe such a
12 withdrawal from the partnership by Babineau in September of 2014. *Id.* According to Second
13 Measure, California has a policy in favor of unrestrained competition and California courts have
14 recognized a partner’s right to continue in the same line of business after withdrawal and
15 dissolution. *Id.* (citing *Miller v. Hall*, 65 Cal. App. 2d 200, 204 (1944)). Accordingly, Second
16 Measure argues that Counterclaims 1–5 must be dismissed because Babineau’s fiduciary duties
17 and obligation not to compete with Kim ended with his withdrawal from the partnership or joint
18 venture in September of 2014, before the breaches alleged in Counterclaims 1–5. *Id.*

19 Finally, Second Measure argues that Kim has not adequately pled that the partnership or
20 joint venture owned any property, so Kim’s counterclaims fail to the extent they rely on
21 misappropriation of property belonging to the joint venture or partnership. *Id.* at 13–15. Second
22 Measure makes two points under this argument. First, Second Measure contends that partners
23 acting in their individual capacities presumptively acquire property as separate property, and
24 Kim’s allegations do not rebut this presumption by pleading that any property belongs or was
25 transferred to the partnership or joint venture. *Id.*

26 Next, Second Measure contends that to the extent that Kim contributed a business idea to
27 the partnership or joint venture, the business idea is too abstract and generic to be protectable
28 property. *Id.* at 14–15. Even if the business idea were protectable property, Second Measure

1 argues that Babineau was entitled to an equal, undivided interest in the idea upon dissolution. *Id.*
2 According to Second Measure, the inadequate pleading of partnership or joint venture property
3 requires dismissal of all of the counterclaims. *Id.* at 15. That is, Second Measure argues that
4 Counterclaims 1–5 must be dismissed because Babineau had a right to any partnership or joint
5 venture property upon dissolution, and Counterclaim 7 must be dismissed because Kim failed to
6 identify any partnership or joint venture property that the Counterclaim Defendants could have
7 converted. *Id.*

8 In the alternative to granting Second Measure’s Motion to Dismiss, Second Measure asks
9 the Court to grant its Motion for a More Definite Statement under Rule 12(e). *Id.* at 15–16. In
10 support of this request, Second Measure argues that the pleading lacks sufficient specificity with
11 respect to the formation of the partnership or joint venture, the property owned by that entity, and
12 the property that was allegedly misappropriated. *Id.* at 16.

13 On August 28, 2015—the same day Second Measure filed the instant Motion—Babineau
14 and Chou filed a Notice of Joinder in Second Measure’s Motion. Dkt. 19. The one-paragraph
15 Notice of Joinder requests that any relief ordered in favor of Second Measure also be ordered in
16 favor of Babineau and Chou. *Id.* at 2.

17 2. Kim’s Opposition

18 In his Opposition, Kim responds to Second Measure’s first three arguments. Opp’n (dkt.
19 25) at 6–11. First, according to Kim, it is not appropriate for the Court to address whether a joint
20 venture or partnership was formed on a motion under Rule 12(b)(6) because this is a fact-specific
21 inquiry that requires development of the record. *Id.* at 6–7. Kim argues that the cases cited by
22 Second Measure actually support this position to the extent that none of them were decided on a
23 motion to dismiss. *Id.* at 7. Kim cites *Sacramento H.D.M. v. Hynes Aviation Industries, Inc.* to
24 support his position that he alleges sufficient facts as to the existence of a partnership or joint
25 venture under California law to survive a motion to dismiss on this issue. Opp’n at 7–8 (citing
26 965 F. Supp. 2d 1141 (E.D. Cal. 2013)).

27 Second, Kim argues he is not required to seek dissolution of the partnership or joint
28 venture and an accounting as a prerequisite for bringing this lawsuit. Opp’n at 9–10. Kim

1 contends that the cases cited by Second Measure on this point, including *Corrales v. Corrales*,
2 recognize an exception to the accounting requirement where one partner has wrongfully destroyed
3 the partnership and converted it to his own use. *Id.* (citing 198 Cal. App. 4th 221 (2011)). Kim
4 contends that his counterclaims fall within the scope of this exception because he alleges that
5 Babineau shut him out of the partnership business and wrongfully expropriated the entire business
6 for himself. *Id.* at 9.

7 Third, Kim argues that Babineau was not entitled to compete in the same line of business
8 after September of 2014 because Babineau did not merely withdraw from the business. *Id.* at 10.
9 Rather, according to Kim, the Answer and Counterclaims alleges that Babineau wrongfully
10 expropriated the business for himself and wrongfully excluded Kim from the joint venture or
11 partnership. *Id.* at 10–11. Even if he did withdraw, Kim argues that Babineau’s conduct was
12 wrongful under *Leff v. Gunter*, in which the California Supreme Court held that a joint venturer
13 may not withdraw from a joint venture in order to expropriate a business opportunity for himself
14 or herself. Opp’n at 10–11 (citing 33 Cal. 3d 508 (1983)).

15 With respect to Second Measure’s final argument—that Kim fails to sufficiently allege that
16 the joint venture or partnership owned property—the Opposition offers only a partial response.
17 See Opp’n at 12. Here, the Opposition does not directly address the assertion that there are no
18 allegations of partnership property. See *id.* Instead, Kim argues that it is inappropriate to resolve
19 issues about who is entitled to partnership property on a motion to dismiss. *Id.* Finally, Kim
20 argues that to the extent the Answer and Counterclaims is deficient, he should be granted leave to
21 amend. *Id.* at 12–13.

22 Along with his Opposition to the Motion, Kim filed an Opposition to the Notice of Joinder
23 filed by Babineau and Chou. Dkt. 23. According to the Opposition, the Notice of Joinder fails to
24 state “how the arguments made by Second Measure in its Motion to Dismiss are applicable to
25 Babineau, Chou, or both,” which makes it “impossible for [Kim] to meaningfully respond.” *Id.* at
26 1.

27 3. Second Measure’s Reply

28 The reply brief—filed by all three Counterclaim Defendants—first argues that Kim’s

1 allegations are insufficient with respect to the existence of a partnership or joint venture because
2 the allegations are not plausible. Reply (dkt. 26) at 3–4. That is, the Counterclaim Defendants
3 argue it is implausible “that the parties agreed to form either a joint venture, or a partnership, but
4 did not care to commit to a single type of entity.” *Id.* at 4.

5 Second, the Counterclaim Defendants contend that Kim’s allegations do not fall within the
6 exception to the accounting requirement that Kim cited in his Opposition. *Id.* at 4–6. The
7 Counterclaim Defendants agree that the exception exists under California law but argue that the
8 exception does not apply because Babineau did not convert *all* of the assets from the partnership
9 or joint venture to his own use. *Id.* Here, Second Measure’s position is that “Babineau could not
10 have converted [Kim’s] Business Idea for his sole use,” so he could not have converted *all* of the
11 assets to his own use. *Id.* at 5 (citing *Corrales v. Corrales*, 198 Cal. App. 4th 221, 228 (2011)).

12 Third, the Counterclaim Defendants argue that Babineau could indeed have dissolved the
13 partnership and continued in the same line of business. *Id.* at 6–7. They argue that *Leff v. Gunter*
14 is distinguishable because *Leff* dealt with a joint venture that persisted after one member withdrew,
15 while the purported partnership or joint venture in this case would have dissolved after Babineau’s
16 withdrawal because a partnership or joint venture requires more than one partner. *Id.*

17 Finally, the Counterclaim Defendants reframe their argument about the pleading’s
18 allegations with respect to partnership property. *Id.* at 7. Whereas the Motion argues that Kim
19 alleges no property to misappropriate, the Reply argues that the absence of allegations of
20 partnership property shows that Kim suffered no damages. *Id.*

21 The Counterclaim Defendants also address Kim’s opposition to the Notice of Joinder.
22 They argue that joinder in the Motion is appropriate because the Motion seeks a ruling that all of
23 Kim’s counterclaims are fatally defective as to all Counterclaim Defendants, so there are no
24 arguments or types of relief that are specific to Second Measure alone. *Id.* at 8.

25 III. ANALYSIS

26 A. Legal Standards

27 1. Motion to Dismiss under Rule 12(b)(6)

28 Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which

1 relief can be granted. FED. R. CIV. P. 12(b)(6). “The purpose of a motion to dismiss under Rule
2 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp. Comm’n*, 720
3 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage is relatively
4 light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a] pleading which sets forth a
5 claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the
6 pleader is entitled to relief.” FED. R. CIV. P. 8(a).

7 In ruling on motions to dismiss under Rule 12(b)(6), courts “take all allegations of material
8 fact as true and construe them in the light most favorable to the nonmoving party.” *Parks Sch. of*
9 *Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a
10 cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v.*
11 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must “contain either direct
12 or inferential allegations respecting all the material elements necessary to sustain recovery under
13 some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citing *Car*
14 *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). “A pleading that offers
15 ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not
16 do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “Nor does
17 a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*
18 (quoting *Twombly*, 550 U.S. at 557). Rather, the claim must be “‘plausible on its face,’” meaning
19 that the plaintiff must plead sufficient factual allegations to “allow[] the court to draw the
20 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
21 *Twombly*, 550 U.S. at 570).

22 **2. Motion for a More Definite Statement under Rule 12(e)**

23 Rule 12(e) states that a party may move for a more definite statement of a pleading “so
24 vague or ambiguous” that the responding party cannot reasonably prepare a response. FED. R.
25 CIV. P. 12(e). The motion “must point out the defects complained of and the details desired.” *Id.*
26 However, the purpose of a Rule 12(e) motion is to attack unintelligibility, not simply lack of
27 detail. *Velasquez v. HSBC Fin. Corp.*, No. 08-4592 SC, 2009 WL 112919, at *4 (N.D. Cal. Jan.
28 16, 2009). Thus, where the detail sought is obtainable through discovery, the motion should be

1 denied. *Id.* A Rule 12(e) motion is “proper only where the complaint is so indefinite that the
2 defendant cannot ascertain the nature of the claim being asserted and therefore cannot reasonably
3 be expected to frame a proper response.” *Gregory Vill. Partners, L.P. v. Chevron U.S.A., Inc.*,
4 805 F. Supp. 2d 888, 896 (N.D. Cal. 2011).

5 **B. Joinder in the Motion**

6 Although the manner in which the various Counterclaim Defendants raise the issues in
7 their Motion is somewhat awkward, the result is clear: the Counterclaim Defendants challenge all
8 claims on the bases raised in Second Measure’s Motion. Accordingly, the Court will allow the
9 joinder and rule on the merits of the arguments raised as to all Defendants named in each
10 counterclaim.

11 **C. Second Measure’s Motion to Dismiss**

12 **1. Breach of Express Joint Venture Agreement and Breach of Express
13 Partnership Agreement (Counterclaims 1 and 3)**

14 **a. Relevant Substantive Law**

15 California law defines a partnership as “the association of two or more persons to carry on
16 as co-owners a business for profit . . . whether or not the persons intend to form a partnership.”
17 Cal. Corp. Code § 16202(a). Similarly, a joint venture is “an undertaking by two or more persons
18 jointly to carry out a single business enterprise for profit.” *Weiner v. Fleischman*, 54 Cal. 3d 476,
19 482 (1991). “From a legal standpoint, both relationships are virtually the same,” so “courts freely
20 apply partnership law to joint ventures when appropriate.” *Id.* Either relationship may be formed
21 orally. *Id.*; *see also* Cal. Corp. Code § 16101(10) (“‘Partnership agreement’ means the agreement,
22 whether written, oral, or implied, among the partners concerning the partnership . . .”). The
23 existence of a partnership or joint venture is a question of fact determined by a preponderance of
24 the evidence. *Weiner*, 54 Cal. 3d at 490.

25 To adequately plead a claim for breach of contract under California law, a plaintiff must
26 allege “a contract, plaintiff’s performance or excuse for failure to perform, defendant’s breach and
27 damage to plaintiff resulting therefrom.” *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457,
28 1489 (2006). The party asserting breach of contract must plead “whether the contract is written, is

1 oral, or is implied by conduct.” Cal. Code Civ. Proc. § 430.10. For breach of a partnership or
2 joint venture, the plaintiff must further allege an agreement to participate in the management of the
3 business. *See Kajlian v. Menezes*, 36 Cal. App. 4th 573, 586 (1995), *as modified on denial of*
4 *reh’g*, (Aug. 3, 1995) (“An essential element of a partnership or joint venture is the right of joint
5 participation in the management and control of the business.”). However, a plaintiff need not
6 allege further formalities, such as sharing of profits and losses, because the existence of a
7 partnership is determined from “the intent of the parties revealed in the terms of their agreement,
8 conduct, and the surrounding circumstances.” *See Holmes v. Lerner*, 74 Cal. App. 4th 442, 454
9 (1999), *as modified*, (Sept. 7, 1999).

10

11 b. Whether the Counterclaim Adequately Alleges the Formation of a Joint
12 Venture or Partnership by Express Agreement

13 Counterclaims 1 and 3 adequately allege that Kim and Babineau formed a joint venture or
14 partnership by express agreement. Kim alleges that around September of 2013, he and Babineau
15 agreed to form an association as partners or joint venturers. Answer & Countercl. at 12–13, ¶¶
16 13–14. Kim alleges that they agreed on a division of business responsibilities. *Id.* at 12, ¶ 13. He
17 alleges that they entered into an “explicit oral agreement” that “each of them would have 1/2
18 ownership and profit interests.” *Id.* at 12–13, ¶¶ 14. Kim alleges that they later agreed to have
19 “equal say in the control of the management of the joint venture/partnership.” *Id.* And Kim
20 alleges that in the subsequent months, they worked long hours together, split business costs, and
21 discussed whether to incur certain business expenses. *Id.* at 13–14, ¶¶ 16–18. Because a joint
22 venture or partnership may be formed orally under California law, these allegations are sufficient
23 to plead that Kim and Babineau formed a joint venture or partnership by their express oral
24 agreement and subsequent collaboration. *See, e.g., Sacramento E.D.M., Inc. v. Hynes Aviation*
25 *Indus., Inc.*, 965 F. Supp. 2d 1141, 1150 (E.D. Cal. 2013) (finding the allegations “sufficient to
26 plead the existence of a partnership” under California law, where the plaintiff alleged the
27 defendant had orally agreed to conduct business together, share profits, provide operating capital,
and assume some control over the business).

28 Second Measure argues that there are two deficiencies in Kim’s allegations about the

1 formation of a joint venture or partnership by express agreement between Babineau and Kim.
2 First, in its Motion, Second Measure contends the pleading is deficient because it fails to allege
3 the usual indicia of the existence of a partnership: co-ownership of property, sharing of gross
4 returns, and sharing of business profits. Mot. at 10–11. The presence or absence of any of these
5 indicia is not dispositive as to whether a joint venture or partnership was actually formed however.
6 *See Holmes*, 74 Cal. App. 4th at 454. Instead, the existence of a joint venture or partnership
7 depends on the overall set of facts and circumstances about the business relationship. *See Weiner*,
8 54 Cal. 3d at 482–83; *Holmes*, 74 Cal. App. 4th at 454.

9 In its Reply, Second Measure argues that Kim fails to plead sufficient *plausible* facts to
10 establish that he and Babineau formed a joint venture or partnership by express oral agreement.
11 Reply at 3–4. Second Measure asserts that it is implausible that “the parties agreed to form either
12 a joint venture, or a partnership, but did not care to commit to a single type of entity.” *Id.* at 4.
13 However, the California Supreme Court has stated that the distinction between partnerships and
14 joint ventures is “not sharply drawn” and that the legal consequences of both relationships “are
15 virtually the same.” *Weiner*, 54 Cal. 3d at 482. Given the near identity of the two business
16 relationships, it is plausible that Kim and Babineau would agree to form a joint venture or
17 partnership without committing to a single form of relationship.

18 Accordingly, Counterclaims 1 and 3 adequately allege that a joint venture or partnership
19 was formed by an express agreement between Kim and Babineau. Counterclaims 1 and 3 also
20 allege the remaining required elements for claims of breach of joint venture agreement and breach
21 of partnership agreement—namely, that Kim performed his duties under the agreement, that
22 Babineau breached the agreement, and that Babineau’s breach caused damages to Kim. *See*
23 Answer & Countercl. at 15–18, ¶¶ 23, 24, 27–31, 43–47.

24
25 c. Whether Kim Must Seek a Dissolution and Accounting as a Prerequisite to
Asserting Counterclaims 1 and 3

26 Historically, one partner could not sue another for claims related to the partnership
27 business without first seeking a dissolution and accounting. *See, e.g., Hosking v. Spartan Props.,*
28 *Inc.*, 275 Cal. App. 2d 152, 156 (1969). The rationale for the accounting requirement was “that it

1 is ordinarily impossible to determine whether or not the defendant partner is in fact indebted to the
2 plaintiff partner until the partnership accounts are settled and the true standing of the parties has
3 been ascertained.” *Id.* at 156–57 (quotation omitted). The accounting requirement was subject to
4 several exceptions, including “where one partner excludes the other, repudiates the very existence
5 of the partnership and converts all of the partnership assets.” *Gherman v. Colburn*, 72 Cal. App.
6 3d 544, 557 (1977). The rationale for this exception was that settling partnership accounts is not
7 required where “the guilty partner has breached (*i.e.* repudiated) the basic agreement which
8 created the partnership [and] denies the very existence of a partnership.” *See id.* at 558.

9 However, California eliminated the accounting requirement when it enacted the Revised
10 Uniform Partnership Act (“CRUPA”) in 1996. Subsection 16405(b) of the Corporations Code⁴
11 now provides:

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to do any of the following:

(1) Enforce the partner's rights under the partnership agreement.

(2) Enforce the partner's rights under this chapter, including all of the following:

• • • •

(3) Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

20 In Counterclaims 1 and 3, Kim seeks to enforce his rights under the partnership or joint
21 venture agreement. Section 16405(b) thus permits Kim to bring these counterclaims “with or

⁴ The comments to subsection 405(b) of the Revised Uniform Partnership Act—which uses substantially identical language to subsection 16405(b) of CRUPA—show that this provision changes the prior common law rule. *See REVISED UNIF. P'SHIP ACT* § 405 cmt. 2 (2015–16 ed.) (“Under RUPA, an accounting is not a prerequisite to the availability of the other remedies a partner may have against the partnership or the other partners. . . . Under subsection (b), a partner may bring a direct suit against the partnership or another partner for almost any cause of action arising out of the conduct of the partnership business. That eliminates the present procedural barriers to suits between partners filed independently of an accounting action.”); *see also* 9 Witkin, *Summary of California Law* 10th (2005) P'ship, § 34 (“At one time, a partner had to sue other partners in equity for dissolution and accounting in order to enforce partnership rights. . . . [CRUPA] takes a significantly different approach. A partner may sue another partner for legal or equitable relief, with or without an accounting regarding partnership business”).

1 without an accounting.” *See Schnabel v. Lui*, 302 F.3d 1023, 1030 (9th Cir. 2002) (Under Section
2 16405(b), “[r]elief is available against another partner for an accounting, enforcement of rights
3 under the partnership agreement, dissolution, and to enforce other rights of a partner arising under
4 the code or for rights independent of the partnership agreement.”).

5 The parties do not discuss section 16405 in their briefs, but Second Measure cites *Corrales*
6 *v. Corrales*, 198 Cal. App. 4th 221 (2011), in support of its assertion that Kim is required to seek
7 dissolution and an accounting. Even though *Corrales* was decided after CRUPA, the court in
8 *Corrales* applied the earlier common law accounting requirement rather than section 16405 and
9 reached a result that is inconsistent with section 16405. *See ALLEN DONN ET AL., REVISED*
10 *UNIFORM PARTNERSHIP ACT* § 405, Authors Comments n.9 (updated 2015) (“*Corrales v. Corrales*
11 . . . is inconsistent with § 405(b).”). Nevertheless, even if *Corrales* is an accurate statement of
12 California law, *Corrales* does not require a different outcome here. This is because the *Corrales*
13 court recognized the common law exception to the accounting requirement, and the allegations of
14 Counterclaims 1 and 3 fall within this exception. *See Corrales*, 198 Cal. App. 4th at 228–29.

15 In *Corrales*, two brothers—Richard and Rudy Corrales—formed a partnership to run an
16 electronics repair business. *Id.* at 224. Several years later, Richard learned that Rudy had secretly
17 formed a competing business offering the same services, and Richard sent Rudy a notice that he
18 was withdrawing from the partnership. *Id.* at 224–25. Richard brought a lawsuit against Rudy,
19 including a claim for breach of fiduciary duty. *Id.* at 228–29. While the trial court concluded that
20 Rudy had breached a fiduciary duty by forming a competing business while the partnership still
21 existed, the trial court also found that Richard failed to prove any damages from the breach. *Id.* at
22 228.

23 On appeal, the court held that Richard was not entitled to damages for this breach of
24 fiduciary duty because one partner cannot sue another based on partnership business until there
25 has been a dissolution and accounting. *Id.* at 228. The court stated that the common law
26 exception to the accounting requirement permits a lawsuit where one partner “wrongfully
27 destroys” the partnership and “converts to his own use its entire assets.” *Id.* But the court found
28 that this exception did not apply because Richard and Rudy had continued to run the partnership

1 together while Rudy developed the competing business, so Rudy had not destroyed the partnership
2 or converted the partnership assets to his sole use. *Id.* at 229. Instead, Richard had terminated the
3 partnership by sending Rudy a notice of withdrawal. *Id.*

4 In contrast to the facts of *Corrales*, Kim's counterclaims would fall within the exception to
5 the accounting requirement. Kim does not allege that he dissociated or withdrew from the
6 partnership, as the plaintiff partner had in *Corrales*. *See id.* at 224–25. Rather, he alleges that
7 Babineau and Chou “wrongfully and physically shut [him] out of the joint venture/partnership.”
8 Answer & Countercl. at 15, ¶ 23. Unlike in *Corrales*, where the brothers continued to run the
9 original business together, the Answer and Counterclaims alleges that Babineau and Chou
10 deprived Kim of access to their servers and applications—effectively excluding Kim from the
11 business and converting the business assets to their exclusive use. *See id.* Instead, Kim's
12 allegations more closely match those cases in which courts have applied the common law
13 exception to the accounting requirement. *See, e.g., Gherman v. Colburn*, 72 Cal. App. 3d 544,
14 556 (1977) (applying the exception where the parties formed a joint venture to purchase,
15 subdivide, and market property, and the defendants later denied entering into a joint venture with
16 the plaintiffs and claimed the plaintiffs had no interest in the land); *Navarro v. Perron*, 122 Cal.
17 App. 4th 797, 800 (2004) (stating that the exception would apply where the parties formed a
18 partnership to purchase a duplex and the defendants later filed an unlawful detainer action against
19 the plaintiff and denied the existence of a partnership).

20 With respect to this exception, Second Measure also argues that Babineau could not have
21 converted Kim's business ideas to his sole use, so Babineau could not have converted *all* of the
22 assets to his own use. Reply at 5. According to Second Measure, this makes the exception
23 inapplicable because the exception applies only where one partner converts *all* of the assets to his
24 sole use. *Id.* Second Measure's argument is incorrect. The common law exception exists to
25 permit a lawsuit where one co-partner excludes the other from partnership business and claims the
26 partnership never existed. *See Gherman*, 72 Cal. App. 3d at 557. This is the type of exclusion and
27 appropriation that Counterclaims 1 and 3 allege. *See Answer and Countercl. at 15–18, ¶¶ 23, 24,*
28 44. Accordingly, the Counterclaim Defendants have not shown that Kim was required to seek

1 dissolution and an accounting as a prerequisite to Counterclaims 1 and 3.

2
3 d. Whether Babineau Terminated the Joint Venture or Partnership in September of
4 2014 and Subsequently Was Entitled To Compete

5 Under CRUPA, a partnership is dissolved “by the express will to dissolve and wind up the
6 partnership business of at least half of the partners.” Cal. Corp. Code § 16801(1). After
7 dissolution, a partnership continues “only for the purpose of winding up its business” and “is
8 terminated when the winding up of its business is completed.” *Id.* § 16802(a). Certain duties and
9 obligations between partners end at dissolution, whereas other duties continue until the partnership
10 business has been wound up. For example, a partner’s duty of loyalty “[t]o refrain from
11 competing with the partnership in the conduct of the partnership business” ends at “the dissolution
12 of the partnership.” *Id.* § 16404(b)(3). By contrast, a partner has a continuing duty of loyalty “[t]o
13 account to the partnership and hold as trustee for it any property, profit, or benefit derived by the
14 partner in the conduct and winding up of the partnership business or derived from a use by the
15 partner of partnership property or information, including the appropriation of a partnership
16 opportunity.” *Id.* § 16404(b)(1). A partner’s duty of care similarly persists through the “winding
up of the partnership business.” *Id.* § 16404(c).

17 A partner’s continuing fiduciary duties prevent the partner from engaging in misconduct
18 related to the partnership dissolution. For example, “[a] partner may not dissolve a partnership to
19 gain the benefits of the business for himself, unless he fully compensates his copartner for his
20 share of the prospective business opportunity.” *Everest Investors 8 v. McNeil Partners*, 114 Cal.
21 App. 4th 411, 424–25 (2003) (quoting *Leff v. Gunter*, 33 Cal. 3d 508, 515 (1983)). Similarly, “the
22 continuing fiduciary duty which survives dissolution of the partnership is breached if the ex-
23 partner attempts to divert partnership opportunities for his personal benefit to the detriment of his
24 former partners or when the remaining partners exclude the ex-partner from the benefits of an
25 existing partnership opportunity.” *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal. App. 4th
26 1509, 1551 (1998) (citations omitted).

27 On the issue of whether Babineau could have withdrawn from the joint venture or
28 partnership to compete, CRUPA reflects the same principle as the earlier cases on which the

1 parties rely in their briefs: that one party may not withdraw from a joint venture or partnership to
2 appropriate a partnership business opportunity. For example in *Leff v. Gunter*, the defendants
3 participated in a joint venture to develop a bid for a government contract, withdrew from the joint
4 venture, and then submitted their own competing bid. 33 Cal. 3d 508, 511–13 (1983). On appeal,
5 the defendants challenged two jury instructions. *Id.* at 513. One instruction stated that a partner
6 violates a fiduciary duty by secretly entering into a contract being sought by the partnership, and
7 the other stated that a partner’s fiduciary duty continues for as long as the partnership is
8 negotiating for the contract. *Id.* at 513. The California Supreme Court held that the jury
9 instructions correctly stated California law, under which “a partner’s duty not to compete with his
10 partnership with respect to a partnership opportunity which is actively being pursued by the
11 partnership survives his withdrawal therefrom.” *Id.* at 514.

12 With respect to Counterclaims 1 and 3, Second Measure is correct that Babineau was free
13 to withdraw from the partnership at any time, causing its dissolution. *See Mot.* at 12–13.
14 However, the Answer and Counterclaims does not allege that he did so. Rather, the pleading
15 alleges that Babineau wrongfully ousted and shut Kim out from the joint venture/partnership while
16 retaining control of the business’s information and property, thus breaching his agreement with
17 Kim. *See Answer & Countercl.* at 15, ¶¶ 23–24. Accordingly, Second Measure’s argument that
18 Babineau was within his rights to withdraw from the partnership and compete with Kim fails
19 because it contradicts the factual allegations of the Answer and Counterclaims. *See Mot.* at 6;
20 Answer & Countercl. at 15, ¶¶ 23–24.

21 Moreover, even if Babineau had withdrawn from the partnership in September of 2014, the
22 ongoing obligations arising from his joint venture or partnership agreement would have prevented
23 him from appropriating the business for himself, as Kim alleges that Babineau did. *See Answer &*
24 *Countercl.* at 15, ¶¶ 23–24. Kim alleges that rather than winding up the partnership business and
25 accounting for the profits and benefits to him, Babineau incorporated the partnership business as
26 Second Measure and received seed investments. *Id.* at 15, ¶ 24. Thus, even if Babineau had
27 withdrawn from the partnership in September of 2014, he was not subsequently entitled to engage
28 in the conduct alleged against him, such as shutting Kim out of the business and continuing the

1 business as his own.

2 The cases cited by Second Measure do not stand for a contrary result. For example,
3 Second Measure cites *Miller v. Hall* for the proposition that “[i]n case of dissolution, each partner
4 has a right to reengage in the same line of business, in the absence of an agreement to the
5 contrary.” 65 Cal. App. 2d 200, 204 (1944). In *Miller*, a two-person partnership dissolved after
6 one partner suffered a stroke, and the other partner represented to their clients that he would
7 continue the same business under a new name. *Id.* at 202. The trial court found that the
8 continuing partner “had appropriated . . . the business, records and good will of the partnership,”
9 and the trial court ordered that partner to account to the other for half the value of the business. *Id.*
10 at 203. The appellate court affirmed, reasoning that if a business’s information and reputation are
11 “appropriated by one of the former partners for his own use and benefit he may be required to
12 account to the other partner for his interest in any such value.” *Id.* at 205. *Miller* thus shows that
13 one party cannot dissolve and appropriate the business of a partnership without liability to the
14 other partner.

15 Second Measure also contends that *Leff v. Gunter* is “inapposite” because the joint venture
16 in *Leff* persisted after the withdrawal of some partners, whereas Babineau’s withdrawal from a
17 partnership with Kim would have dissolved the partnership. Reply at 6–7. However, this
18 distinction is immaterial because the court’s reasoning in *Leff* was based on the “obvious and
19 essential unfairness in one partner’s attempted exploitation of a partnership opportunity for his
20 own personal benefit and to the resulting detriment of his copartners,” which exists whether or not
21 the partnership persists. 33 Cal. 3d at 514. Moreover, the court in *Leff* relied on *Page v. Page*, in
22 which the court recognized the “continuing fiduciary obligation” of a partner who unilaterally
23 dissolved a two-person partnership and tried to exclude his co-partner from a partnership business
24 opportunity—precisely the situation in which Second Measure argues that Babineau had the right
25 to pursue the same business. *Id.* at 515 (citing *Page v. Page*, 55 Cal. 3d 192, 197 (1961)); Mot. at
26 13.

27 Accordingly, even if Babineau had withdrawn from the partnership in September of 2014,
28 he still would not have been permitted to subsequently appropriate joint venture or partnership

1 business without breaching the obligations arising from the express agreements alleged in
2 Counterclaims 1 and 3.

3

4 e. Whether the Answer and Counterclaims Adequately Alleges the Existence of
Partnership Property

5 Second Measure's final argument challenges the adequacy of Kim's allegations about
6 partnership property. However, Second Measure frames the argument differently in the Motion
7 and the Reply. The Motion argues that the allegations fail to show property that could have been
8 misappropriated, while the Reply argues that the allegations fail to show Kim has suffered any
9 damages. Mot. at 15; Reply at 7–8.

10 Both theories apparently assume that the partnership was dissolved, which is an incorrect
11 characterization of the allegations. *See* Mot. at 6–7, 13–15; Reply at 7–8. As described with
12 respect to Babineau's continuing duties, the Answer and Counterclaims does not allege that
13 Babineau dissolved and terminated the partnership. Instead, the pleading alleges that Babineau
14 wrongfully shut Kim out of the business while continuing to pursue the same business
15 opportunities. *See* Answer & Countercl. at 15, ¶¶ 23–24.

16 Moreover, even if Babineau had dissolved the joint venture or partnership in September of
17 2014, Counterclaims 1 and 3 still allege that Kim suffered damages. Once a joint venture or
18 partnership is terminated, “[e]ach partner is entitled to a settlement of all partnership accounts”
19 and “[t]he partnership shall make a distribution to a partner in an amount equal to any excess of
20 the credits over the charges in the partner's account.” Cal. Corp. Code § 16807. If Babineau had
21 terminated the joint venture or partnership, Kim would have been entitled to a distribution based
22 on the business's assets and profits. *See id.* Kim alleges sufficient facts to support an inference
23 that the business actually possessed assets, such as purchased datasets, servers, and related
24 infrastructure, as well as investments in the company. *See* Answer & Countercl. at 13–15, ¶¶ 15,
25 18, 23, 24. In Counterclaims 1 and 3, Kim claims to be entitled to a share of the business's past
26 and present proceeds, as well as other relief. *Id.* at 16–18, ¶¶ 28, 44. Accordingly, Counterclaims
27 1 and 3 sufficiently allege that Kim suffered damages. Second Measure's request to dismiss
28 Counterclaims 1 and 3 is therefore DENIED.

2. Breach of Implied Joint Venture Agreement and Breach of Implied Partnership Agreement (Counterclaims 2 and 4)

a. Relevant Substantive Law

In the absence of an express agreement to form a joint venture or partnership, “[a] joint venture or partnership may be . . . assumed to have been organized from a reasonable deduction from the acts and declarations of the parties.” *Weiner v. Fleischman*, 54 Cal. 3d 476, 482–83 (1991) (quotation omitted). Section 16202(c) of the Corporations Code provides rules for “determining whether a partnership has been formed.” These rules provide that joint ownership of property and sharing of gross returns do not by themselves establish a partnership. *Id.* § 16202(c)(1)–(2). The sharing of profits, by contrast, creates a presumption that a partnership exists, unless the profits were used for certain purposes. *Id.* § 16202(c)(3).

While joint ownership of property, sharing of gross returns, and sharing of profits can be evidence of the existence of a joint venture or partnership, they are not required elements, and the presence or absence of any one feature “is not necessarily dispositive.” *See Holmes v. Lerner*, 74 Cal. App. 4th 442, 454 (1999), *as modified*, (Sept. 7, 1999). Instead, “[t]he crucial factor is the intent of the parties revealed in the terms of their agreement, conduct, and the surrounding circumstances when determining whether a partnership exists.” *Interserve, Inc. v. Fusion Garage PTE. LTD.*, No. C 09-5812 RS PVT, 2010 WL 3339520, at *5 n.3 (N.D. Cal. Aug. 24, 2010) (quoting *Holmes*, 74 Cal. App. 4th at 454) (alterations and emphasis omitted). Accordingly, to adequately plead the existence of an implied partnership or joint venture agreement, a plaintiff need only allege conduct and circumstances from which an intention to operate a business as co-owners and share management responsibilities may be inferred, regardless of whether the parties intended to form a partnership. *See Holmes*, 74 Cal. App. 4th at 454; *see also* Cal. Corp. Code § 16202(a) (defining a partnership as “the association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intended to form a partnership”).

b. Whether the Answer and Counterclaims Adequately Alleges the Existence of an Implied Joint Venture or Partnership Agreement

Counterclaims 2 and 4 adequately allege the existence of an implied joint venture or partnership between Kim and Babineau. Kim alleges that he and Babineau agreed to develop and

1 run a business together, as well as alleging conduct from which that intent may be inferred, even if
2 Kim and Babineau did not have an express agreement to operate as joint venturers or partners. *See*
3 Answer & Countercl. at 12–13, ¶¶ 13–15. In particular, Kim alleges that the two named their
4 business, agreed to share ownership of the business, and decided to manage different aspects of
5 the business. *Id.* ¶¶ 13–14. Kim alleges that he and Babineau signed tandem non-disclosure
6 agreements with a data provider to acquire consumer spending datasets. *Id.* at 13, ¶ 15. Further,
7 Kim alleges that between September of 2013 and September of 2014, he and Babineau worked
8 long hours together, split business costs, and discussed whether to incur certain business expenses.
9 *Id.* at 13–14, ¶¶ 16–18.

10 Second Measure is correct that Counterclaims 2 and 4 do not allege the indicia of a
11 partnership described in section 16202(c) of the Corporations Code: joint ownership of property,
12 sharing of gross returns, and sharing of profits. *See* Mot. at 10. But the presence or absence of
13 any of these indicia is not dispositive. *See Holmes*, 74 Cal. App. 4th at 454. Rather, the existence
14 of a joint venture or partnership depends on the whether Kim and Babineau intended “to carry on
15 as co-owners a business for profit,” which is revealed through their agreements, conduct, and
16 surrounding circumstances. *See* Cal. Corp. Code § 16202(a); *Holmes*, 74 Cal. App. 4th at 454.
17 Counterclaims 2 and 4 allege sufficient agreements, conduct, and circumstances from which it
18 may be inferred that Kim and Babineau intended to operate a business as co-owners.

19 Accordingly, Counterclaims 2 and 4 adequately allege the existence of an implied joint
20 venture or partnership. Further, as described with respect to Counterclaims 1 and 3,
21 Counterclaims 2 and 4 adequately allege that Kim performed his duties under the agreement, that
22 Babineau breached the implied agreement, and that Babineau’s breach caused damages to Kim.
23 See Answer & Countercl. at 15–20, ¶¶ 23, 24, 36–40, 52–56.

24 c. Second Measure’s Remaining Arguments

25 Second Measure’s remaining arguments fail with respect to Counterclaims 2 and 4 for the
26 same reasons as Counterclaims 1 and 3. Kim is permitted to bring his action without first seeking
27 an accounting because Kim is seeking to enforce his rights as a partner or joint venturer. *See* Cal.
28 Corp. Code § 16405(b)(1)–(2). Kim has adequately alleged damages because he claims to be

1 entitled to his share of the business's assets and profits. *See* Answer & Countercl. at 17–20, ¶ 37,
2 40, 53, 56; Cal. Corp. Code § 16807. And even if Babineau dissolved the joint venture or
3 partnership in September of 2014, he was not subsequently entitled to appropriate its business
4 opportunities. *See* Cal. Corp. Code § 16404(b); *Leff*, 33 Cal. 3d at 514. Second Measure's request
5 to dismiss Counterclaims 2 and 4 is therefore DENIED.

6 **3. Breach of Fiduciary Duty (Counterclaim 5)**

7 a. Relevant Substantive Law

8 To establish a breach of fiduciary duty, a plaintiff must show "(1) existence of a fiduciary
9 duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." *People*
10 *ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 950 (2013) (quotation omitted). Section 16404 of
11 the California Corporations Code provides a nonexclusive list of the fiduciary duties that one
12 partner owes to another. *See Enea v. Superior Court*, 132 Cal. App. 4th 1559, 1565 (2005)
13 (holding that the list is "comprehensive, but not exhaustive" (quotation and emphasis omitted)).
14 Because fiduciary duties are imposed by statute, pleading the existence of partnership or joint
15 venture is sufficient to establish the existence of a fiduciary duty. *See Sacramento E.D.M., Inc. v.*
16 *Hynes Aviation Indus., Inc.*, 965 F. Supp. 2d 1141, 1150 (E.D. Cal. 2013).

17 The fiduciary duties imposed by statute include the duty to account to the partnership for
18 profits and for benefits "derived from a use by [a] partner of partnership property or information,
19 including the appropriation of a partnership opportunity." Cal. Corp. Code § 16404(b)(1). As
20 described with respect to Counterclaims 1 and 3, these fiduciary duties persist after dissolution of
21 the partnership such that a partner may not "divert partnership opportunities for his personal
22 benefit to the detriment of his former partners or . . . exclude the ex-partner from the benefits of an
23 existing partnership opportunity." *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal. App. 4th
24 1509, 1551 (1998) (citations omitted).

25
26 b. Whether the Answer and Counterclaims Adequately Alleges Breach of a
Fiduciary Duty

27 Counterclaim 5 adequately alleges the existence of a fiduciary duty because, as described
28 above, Counterclaims 1–4 allege the existence of a partnership or joint venture in sufficient detail.

1 See *Sacramento E.D.M., Inc.*, 965 F. Supp. 2d 1150. Counterclaim 5 further alleges breach of a
2 fiduciary duty because it alleges that Babineau shut Kim out of the business and appropriated its
3 property, information, and opportunities for himself. Answer & Countercl. at 15–20, ¶¶ 23, 24,
4 58, 59. Moreover, as described with respect to Counterclaims 1 and 3, even if Babineau dissolved
5 the joint venture or partnership in September of 2014, the allegations are sufficient to support an
6 inference that he breached his ongoing fiduciary duties by appropriating the business's
7 opportunities for himself after the dissolution. See Cal. Corp. Code § 16404; *Crouse*, 67 Cal. App.
8 4th at 1551. Finally, Kim alleges that Babineau's breach of a fiduciary duty caused him harm.
9 See Answer & Countercl. at 15–20, ¶¶ 23, 24, 27–31, 36–40, 43–47, 52–56, 61. Accordingly,
10 Counterclaim 5 adequately alleges breach of a fiduciary duty.

11 c. Second Measure's Remaining Arguments

12 Second Measure's remaining arguments fail with respect to Counterclaim 5 for the same
13 reasons as Counterclaims 1–4. Section 16405(b)(2)(A) of the Corporations Code permits Kim to
14 enforce a partner's fiduciary duties without bringing an accounting action as a prerequisite. And
15 as described above, Kim has adequately alleged damages by alleging that Babineau's breach of
16 fiduciary duty has deprived him of partnership or joint venture assets and profits to which he is
17 entitled. See, e.g., Answer & Countercl. at 16–20, ¶¶ 28, 37, 56, 61; see also Cal. Corp. Code §
18 16807. Second Measure's request to dismiss Counterclaim 5 is therefore DENIED.

19 **4. Conversion (Counterclaim 7)**

20 a. Relevant Substantive Law

21 Under California law conversion refers to "an actual interference with [the plaintiff's]
22 ownership or right of possession." *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 136 (1990).
23 To establish a claim of conversion, the plaintiff must show "(1) the plaintiff's ownership or right
24 to possession of the property; (2) the defendant's conversion by wrongful act inconsistent with the
25 property rights of the plaintiff; and (3) damages." *In re Emery*, 317 F.3d 1064, 1069 (9th Cir.
26 2003) (citing *Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1065 (1998)). One partner can be liable
27 to another for conversion of partnership property. *Oakdale Vill. Grp. v. Fong*, 43 Cal. App. 4th
28 539, 546 (1996), as modified on denial of reh'g, (Apr. 10, 1996). Further, intangible property

such as corporate shares and bonds may be the proper subject of a conversion claim. *See Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1411 (9th Cir. 1996) (collecting California cases); *see also Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 125 (2007) (holding that a business's net operating loss is the proper subject of conversion because it is a definite, recordable amount). However, more abstract intangible property, such as business goodwill and business strategies are not proper subjects of conversion. *See Fremont*, 148 Cal. App. 4th at 123.

b. Whether the Answer and Counterclaims Adequately Allege Conversion

Counterclaim 7 adequately alleges the elements of Conversion against the Counterclaim Defendants. First, as described with respect to Counterclaims 1 and 3, Kim alleges the existence of property to which he was entitled because, assuming Kim's allegations to be true, Kim would have had a right to a share of the business's assets and profits. *See Cal. Corp. Code § 16807; Answer & Countercl. at 21 ¶ 64* ("Kim . . . was entitled to . . . his share of the [business's] property, assets, and profits") Further, this is the type of property that is the proper subject of a claim of conversion because it is of ascertainable value. *See Fremont*, 148 Cal. App. 4th at 122–25, *Oakdale*, 43 Cal. App. 4th at 546.

Second Measure apparently contends that its argument about the sufficiency of Kim's allegations of partnership property is particularly applicable to the counterclaim of conversion because it shows there was no property to convert or misappropriate. *See Mot.* at 15. Here, Second Measure emphasizes that abstract and intangible business strategies—such as Kim's idea of analyzing and leveraging consumer datasets—are not the type of property that can be converted. *Id.* at 15; *Reply* at 5, 7–8. However, regardless of whether Kim's business idea constitutes the type of property that can be converted, Kim claims that he is entitled to a share of the business's assets and profits. *Answer & Countercl.* at 21, ¶ 64. Because the business assets and profits would be the proper subject of a claim of conversion, that property alone is sufficient to support Counterclaim 7. *See Fremont*, 148 Cal. App. 4th at 122–25; *Oakdale*, 43 Cal. App. 4th at 546.

Counterclaim 7 also adequately alleges the second element of conversion—that the

Counterclaim Defendants wrongfully converted the property to which Kim was entitled. The Counterclaim alleges that Babineau and Chou “formed an undisclosed intent to eventually wrongfully exclude [Kim] from the joint venture/partnership, in order to take for themselves [Kim’s] rightful share of the enterprise.” Answer & Countercl. at 15, ¶ 22. Kim further alleges that in September of 2014, Babineau and Chou actually did exclude him from the business by “depriving him of access to computer servers and shared online chat and note applications to prevent [Kim] from doing any further work . . . or accessing his work product created up to that point.” *Id.* ¶ 23. By shutting Kim out of the business and refusing to communicate with him, Counterclaim 7 alleges that Babineau, Chou, and Second Measure wrongfully deprived him of the business assets and profits to which he was entitled. *Id.* at 15–21, ¶¶ 22–24, 64–65. Because this also establishes that Kim suffered damages from the conversion, Counterclaim 7 adequately alleges conversion with respect to the Counterclaim Defendants. *See id.* ¶ 67.

c. Second Measure's Remaining Arguments

As described with respect to Counterclaims 1–5, Second Measure’s remaining arguments also fail for Counterclaim 7. Under section 16405(b) of the California Corporations Code, Kim is permitted to bring his action without first seeking an accounting. As described above, Kim has adequately alleged damages by alleging that the Counterclaim Defendants converted partnership assets and profits to which he was entitled. Second Measure’s request to dismiss Counterclaim 7 is therefore DENIED.

D. Motion for a More Definite Statement

The allegations in the Answer and Counterclaims are not so vague or ambiguous that the Counterclaim Defendants cannot reasonably prepare a response. *See* FED. R. CIV. P. 12(e). With respect to the formation of the partnership or joint venture, Kim alleges when the relationship was formed and the general terms on which he and Babineau agreed. Answer & Countercl. at 12–13, ¶¶ 13–14. With respect to partnership property, Kim alleges a division of business expenses; the existence of shared computer servers, applications, and datasets; and partnership assets and profits to which Kim claims to be entitled. *Id.* at 14–21, ¶¶ 18, 23, 64. This is sufficient detail for the Counterclaim Defendants to frame a response. The further detail that the Counterclaim

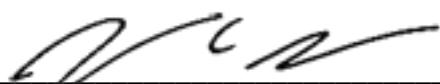
1 Defendants seek is the type of information that is properly obtained through discovery, not a
2 motion under Rule 12(e). *See Velasquez v. HSBC Fin. Corp.*, No. 08-4592 SC, 2009 WL 112919,
3 at *4 (N.D. Cal. Jan. 16, 2009).

4 **IV. CONCLUSION**

5 For the reasons stated above, Plaintiffs' motion is DENIED.

6 **IT IS SO ORDERED.**

7
8 Dated: November 10, 2015

9
10 
11 JOSEPH C. SPERO
12 Chief Magistrate Judge